IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 3.

FRANCISCO ROMERO,

*Petitioner,*

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE and GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,

*Respondents.*

## BRIEF FOR RESPONDENT, QUIN LUMBER CO., INC.

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### Opinions Below

The opinion of the District Court (R. 247a-253a) is reported at 142 F. Supp. 570. The opinion of the United States Court of Appeals for the Second Circuit (App., p. 47 of Petition) is reported at 244 F. 2d 409.

### Jurisdiction

The jurisdictional requisites are adequately set forth in the Petitioner's brief.

### Question Presented

In the absence of complete diversity of citizenship between an alien seaman and each of the defendants does

the District Court have jurisdiction on the civil side of a claim for personal injuries sustained on a vessel in navigable waters by the mere sham allegation of the alien seaman that he invokes the benefits of the Jones Act, 46 U. S. C. §688, against his employer, an alien shipowner, one of several defendants in this action?

## Statutes Involved

The statutes which are involved are 28 U. S. C. §1331, §1332 and 46 U. S. C. §688. These are set forth in the Appendix to Petitioner's brief.

## Statement

When this matter came on for trial in the District Court, the defendants moved to dismiss the action in view of the Court's lack of jurisdiction of the subject matter of this action, i.e., no Jones Act had been, or could be, properly asserted by the petitioner against Compania (Spanish Line) and there was an absence of complete diversity of citizenship between the petitioner and each of the defendants, respondents here.

Since that question depended upon the status of the parties vis-à-vis and their nationality (R. 2a) the Court took proof as to the *facts upon which jurisdiction had been alleged.* It did *not* decide this case on the *merits.* A decision on the merits would have been a finding of liability to pay damages on the part of one or more of the respondents or the absence of liability of all respondents. That would have been a decision on the *merits.*

The District Court first sought a stipulation of those jurisdictional facts which were not in dispute.

It was stipulated upon the hearing to determine jurisdiction of the subject matter herein that the citizenship of the parties was as follows (p. 572 of 142 F. Supp.):

(a) Plaintiff was a Spanish national.

(b) Defendant, International Terminal Operating Co., hereinafter referred to as International, was a Delaware corporation.

(c) Defendant, Spanish Line, was a Spanish corporation.

(d) Defendant, Garcia & Diaz, hereinafter referred to as Garcia, was a New York corporation.

(e) Defendant, Quin Lumber Co., Inc., hereinafter referred to as Quin, was a New York corporation.

Manifestly, we have a Spanish subject suing a Spanish subject and 3 citizens of states of the United States on the civil side of the federal Court.

It was and is the contention of Quin that, since both the petitioner and Spanish Line are aliens, the District Court lacked jurisdiction over the subject matter of the instant action and correctly so held. A determination of the soundness of such contention necessitates an analysis of the amended complaint.

In essence, this is an action brought by a foreign seaman to recover damages for personal injuries sustained while aboard the S. S. Guadalupe on May 12, 1954 by reason of the alleged negligence of the defendants. Four causes of action are set forth in the amended complaint.

The first cause of action was asserted against the Spanish Line and Garcia under the Jones Act, 46 U. S. C. §688, and the General Maritime Law (R. 197a-206a).

The second cause of action was asserted against Spanish Line and Garcia under the General Maritime Law for wages to the end of the voyage and for maintenance and cure (R. 201a).

The third cause of action was directed solely against the defendant International and consists of allegations to the effect that it was the negligence of International which caused injury to the plaintiff. It is to be noted that in paragraph "TWENTIETH" of the amended complaint it is alleged as follows (R. 202a):

> "The jurisdiction of this Court in regard to plaintiff's claim against the defendant INTERNATIONAL TERMINAL OPERATING Co. is predicated upon diversity of citizenship between the plaintiff and INTERNATIONAL TERMINAL OPERATING Co. and the amount in controversy is in excess of THREE THOUSAND ($3,000) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters and therefore, said cause of action against the defendant INTERNATIONAL TERMINAL Co. is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

The fourth cause of action set forth in the amended complaint, although purportedly asserted against Quin for its alleged negligence which caused the plaintiff's injuries, contains in paragraph "TWENTY-NINTH" allegations of negligence on the part of each of the defendants-appellees (R. 204a) herein. In so far as the District Court's jurisdiction over the cause of action asserted against the defendant Quin is concerned, it is alleged in paragraph "TWENTY-EIGHTH" of the amended complaint as follows (R. 204a):

> "The jurisdiction of this Court in regard to plaintiff's claim against the defendant QUIN LUMBER Co., INC., is

predicated upon diversity of citizenship between the plaintiff and QUIN LUMBER CO., INC., and the amount in controversy is in excess of THREE THOUSAND ($3,000-.00) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters, and theretofore, said cause of action against the defendant QUIN LUMBER CO., INC., is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

It is thus clear that this action, considered as a whole, is one for damages for personal injuries allegedly caused by the negligence of each of the four respondents herein, notwithstanding the fact that the District Court's jurisdiction was invoked and bottomed on different bases respecting the various defendants.

Without allowing any proof as to the manner in which the accident occurred and therefor in no way determining whether there was negligence on the part of any of the respondents herein, which would then be a determination on the merits, the District Court correctly determined that it first had to find whether the allegation that the alien seaman, petitioner herein, was entitled to the benefits of the Jones Act, 46 U. S. C. §688, was a sham allegation—this, in order to dispose of one facet of the jurisdictional question. The District Court found that the allegation that the petitioner was a seaman entitled to invoke the benefits of the Jones Act was a sham allegation and finding no basis for jurisdiction under the Jones Act and no other basis for retention of this matter on the civil side of the Court the District Court gave the petitioner the choice to transfer the action to the admiralty side of the Court (R. 188a-189a). Upon the petitioner refusing and

upon the District Court's determination that it had no jurisdiction on the civil side it dismissed the complaint.

The Court of Appeals affirmed said dismissal on the District Court's "workmanlike opinion below which contains a full statement of the facts" (p. 410 of 244 F. 2d).

After the affirmance by the Court of Appeals for the Second Circuit of the dismissal of petitioner's complaint, petitioner instituted an action against all the respondents in the Supreme Court of the State of New York, New York County, and said action is presently pending in that court.

## Argument

The petitioner's sham allegation that he was entitled to proceed under the Jones Act did not vest the District Court with jurisdiction of that cause of action. The evidence which was adduced on the jurisdictional questions of fact under the Jones Act dictated a dismissal of that cause of action.

There being no diversity of citizenship between the plaintiff and every defendant, there was no jurisdiction on the law side of the District Court of the petitioner's remaining causes of action. The petitioner's remaining causes of action were not claims arising under the Constitution or laws of the United States.

In the absence of a valid primary jurisdiction there could be no pendent jurisdiction entitling petitioner to trial by jury of the second, third and fourth causes of action.

## POINT I

**The petitioner, a Spanish seaman, is not entitled to the benefits of the Jones Act against his employer, a Spanish shipowner, for injuries which occurred on a foreign flagship upon which the petitioner was serving under Spanish articles which incorporated the Spanish law.**

It will not be the function of this brief to treat extensively with the right of the petitioner, a foreign seaman, to the benefits of the Jones Act. We assume that Spanish Line, the foreign shipowner, and various *amici*, foreign sovereigns and shipowners, will present full argument on that subject.

In view of this Court's consideration of this problem in *Lauritzen* v. *Larsen*, 345 U. S. 571, 73 S. Ct. 921, and its holding it would be an act of supererogation for this respondent to outline the many considerations that point up the conclusion that the Jones Act, 46 U. S. C. §688, does not give to the petitioner a right of action against his foreign employer. As one excellent treatise (*Gilmore and Black, The Law of Admiralty*, p. 389) has said in dealing with the *Lauritzen* case:

> "It would have been, Justice Jackson pointed out, entirely within the power of Congress to have enacted a statute directing our courts to take jurisdiction of, and to apply our law to, maritime personal injury cases whether or not there was any domestic contact beyond the fact that the court had jurisdiction of the parties. Nevertheless, he concluded, on a review of the legislative history there was no persuasive proof that Congress had so intended."

In an attempt to bolster his argument that Congress intended to *specifically* cover foreign seamen under the Jones Act the petitioner by setting forth the debates in Congress which resulted in the enactment of §688 of 46 U. S. C. (commonly referred to as the Jones Act) and *other* sections, argues that Congress legislated with respect to personal injuries of foreign seamen in view of this Court's opinion in *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 354, dealing with wages of foreign seamen. He then argues that there was no need to enact the Jones Act insofar as *American* seamen were concerned and therefor the Jones Act was directed to foreign seamen. That this is palpably wrong is seen from a review of the background leading to the enactment of the Jones Act. *Engel* v. *Davenport*, 271 U. S. 33, 46 S. Ct. 410; *McAfoos* v. *Canadian Pacific Steamships*, 243 F. 2d 270, 271; *Robinson on Admiralty*, p. 309 *et seq.*; *Willock, Commentary on Maritime Workers*, preface to 46 U. S. C. §688; *Gilmore and Black, The Law of Admiralty*, p. 279 *et seq.*

Since the petitioner has not shown (and we respectfully submit could not show) that Congress intended foreign seamen to be embraced by the Jones Act with respect to a claim for personal injuries against a foreign shipowner, the District Court, a court of recognized limited jurisdiction, had no jurisdiction of the Jones Act cause of action.

If the petitioner was entitled to the benefits of the Jones Act and therefor properly invoked the limited jurisdiction of the District Court, all of the remaining questions of law become academic. Contrariwise, if the Jones Act was never available to the petitioner, his mere sham allegation that he was entitled to the benefits of the Jones Act could not confer jurisdiction on the District Court. Otherwise, the mere assertion by a plaintiff that he is entitled to

the benefits of a federal statute which creates a right would deprive a District Court from making an initial inquiry into the *jurisdictional facts.*

That would dictate a District Court in the case of a Jones Act suit hearing all evidence dealing with the merits, i.e., was the shipowner negligent, did the negligence proximately cause the injury and what damages are recoverable by the plaintiff, and after a protracted trial determine that it did not have jurisdiction of the controversy in that the foreign seaman in the first instance could not have invoked the Jones Act. It is respectfully submitted that this Court did not by its statement at page 575 of 345 U. S. (*Lauritzen* v. *Larsen*) intend to indicate or hold that the mere assertion by the plaintiff of jurisdictional facts deprives the District Court of inquiry into the same. If it did, it would necessarily follow that a plaintiff's allegation that there was diversity of citizenship between the plaintiff and each defendant could not be inquired into. Those are the *jurisdictional facts* in a diversity of citizenship case. The *jurisdictional facts* in *this* action, asserted by the plaintiff-petitioner, are that he has a right to sue under the Jones Act.* The evidence was otherwise.

If the *mere assertion* clothed the District Court with jurisdiction and power to hear the entire controversy, although the facts showed the allegations to be false, then a premium is put on falsity and all other questions of jurisdiction are rendered academic.

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* As was said in *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 504:

"• • • A right is a well founded or acknowledged claim; • • •"

## POINT II

**The claims asserted by the petitioner herein, based on the General Maritime Law, are not claims which arise under the Constitution, laws or treaties of the United States within the meaning of 28 U. S. C. §1331.**

Considerations of Jones Act jurisdiction aside, Point I, *supra,* we come to the jurisdiction of the District Court by virtue of §1331 of 28 U. S. C. which is the "federal question" statute.*

The language which is presently found in §1331 of 28 U. S. C., formerly the Judiciary Act of 1875 (§1, Act of March 3, 1875, 43 Cong., 2nd Sess., chap. 137, 18 Stat. 470), takes its wording from Article III, §2, of the Constitution (*Hart & Wechsler, The Federal Courts and the Federal System,* pages 727-730, 749-752).

That Article III, §2 of the Constitution embraced 3 separate and distinct classes of cases and that cases within the admiralty jurisdiction did not "arise under" the Constitution was stated by this Court in 1828 in *American Insurance Co.* v. *Canter,* 1 Pet. 541, 545:

> "The Constitution certainly contemplates these as three distinct classes of cases, and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution,

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* Since the plaintiff is an alien and one of the defendants is also an alien we do not have complete diversity of citizenship between the plaintiff and each of the defendants so that there is no jurisdiction under §1332 of 28 U. S. C. *Salem Co.* v. *Manufacturers Finance Co.,* 264 U. S. 182, 44 S. Ct. 266; *Camp* v. *Gress,* 250 U. S. 308, 39 S. Ct. 478; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 60 S. Ct. 44; *Compania Minera Y Compradora etc.* v. *American Metal Co.,* 262 F. 183; *Ex Parte Edelstein,* 30 F. 2d 636.

is, we think, conclusive against their identity. If it were not so—if this were a point open to inquiry—it would be difficult to maintain the proposition that they are the same. *A case in admiralty does not, in fact, arise under the Constitution or laws of the United States.*" (Italics supplied.)

If an action at law were to be brought in connection with a maritime tort, a separate basis of jurisdiction, e.g., diversity of citizenship, must be found. Thus, in *The Belfast*, 7 Wall. 624, this Court said (p. 643):

"Nothing is said about a concurrent jurisdiction in a State Court or in any other court, and it is quite clear that in all cases *where the parties are citizens of different States*, the injured party may pursue the common law remedy here described and saved, in the Circuit Court of the district as well as in the State Courts." (Italics supplied.)

And at page 644;

"Properly construed, a party under that provision may proceed *in rem* in the admiralty; or he may bring a suit *in personam* in the same jurisdiction; or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State Courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case." (Italics in original.)

To the same effect, see

*Leon* v. *Galceran*, 11 Wall. 185;
*American Steamboat Company* v. *Chase*, 16 Wall. 522, 533;
*Panama RR Co.* v. *Vasquez*, 271 U. S. 557.

It is respectfully submitted that the considerations, which commend to this Court the holding that the District Court on the law side has no jurisdiction of a claim for personal injuries, absent diversity of citizenship, as one arising under the Constitution or laws of the United States, are set forth in *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615 and *Jordine* v. *Walling*, 185 F. 2d 662.

If adherence to the principle that a claim "arising under the Constitution, treaties or laws of the United States" must directly involve the construction of a specific constitutional provision, federal statute or treaty, which construction would be dispositive of the claim, *Gully* v. *First National Bank*, 299 U. S. 109, then certainly the reasoning of the Court of Appeals for the Third Circuit in *Jordine* v. *Walling*, 185 F. 2d 662, is indeed significant (p. 668):

> "Nor does the fact that it was the Constitution which adopted and established the rules of the maritime law as part of the law of the United States compel the conclusion that a civil action upon a purely maritime claim is cognizable under that section as one arising under the Constitution itself. For cases arising under the Constitution within the meaning of Article III, Section 2, and of Section 1331 which implements it, are only such cases as really and substantially involve a controversy as to the effect or construction of the Constitution upon the determination of which the result depends. Purely maritime cases, such as suits for maintenance and cure, obviously do not involve such a controversy."

Petitioner would have this Court hold that the Act of March 3, 1875, presently 28 U. S. C. §1331, granted to the District Court original jurisdiction of every case of which this Court had appellate jurisdiction (p. 22 of Brief of Pet.).

He argues therefrom that since this Court has authority to review "federal question" cases involving the substantive maritime law, the District Court therefor has original jurisdiction. Reliance is seemingly placed upon decisions like *Garrett* v. *Moore McCormack,* 317 U. S. 219. That such a position is untenable, we submit, is answered in *Jordine* v. *Walling,* 185 F. 2d 662, as follows (p. 668):

> "It is true that the merits of a common law action upon a maritime claim, if brought in a state court, are reviewable by the Supreme Court under Section 1257(3) of Title 28 U. S. C. because a federal question is involved. But it does not follow that such an action may be brought in a federal district court under Section 1331. For it has been held that a case does not necessarily arise under the Constitution or laws of the United States within the meaning of Section 1331 merely because it involves a federal question, i.e., a 'title, right, privilege or immunity * * * specially set up or claimed under the Constitution, treaties or statutes of * * * the United States', which is reviewable under Section 1257(3). Thus, while a suit for maintenance and cure involves a 'right * * * claimed under the Constitution' in the sense that the Constitution made the ancient maritime law, including its doctrine of maintenance and cure, a part of our national law and is thus within the purview of Section 1257(3), such a suit is not a case which 'arises under the Constitution' in the sense of involving a controversy as to the construction of that document and is, therefore, not within the scope of Section 1331."

We submit that in the *Garrett* case, *supra,* as well as in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, relied upon by petitioner (Pet. Brief, pp. 27-28), this Court was interested in establishing a uniform system of maritime

law which would have been frustrated if state substantive concepts of burden of proof as to releases were followed or if a state could legislate with respect to employees in maritime work.

Nor does the "saving to suitors" clause (Section 1333 of 28 U. S. C.) come to the aid of the petitioner herein since that clause was not an affirmative grant of jurisdiction but merely excepted from the exclusive maritime or admiralty jurisdiction of the District Courts all cases in which actions could be brought for remedies other than admiralty remedies to which suitors were "otherwise entitled." *Paduano v. Yamashita Kisen Kabushiki Kaisha,* 221 F. 2d 615, 617. In order for the petitioner to succeed on the arguments that he has advanced dealing with the jurisdiction of the District Court under Section 1331 of 28 U. S. C. distinguished precedents must be overruled. *Gilmore & Black, The Law of Admiralty,* §6-62, pages 385-386.

The petitioner has shown no legislative intent which supports the arguments which he has advanced.

If the petitioner's argument respecting Section 1331 is to be adopted there can be no question that there will be a tremendous volume of new matters in the Federal Court by reason of actions initially instituted therein and by reason of removals to the District Court by defendants under the provisions of §1441(b) of 28 U. S. C. of actions initially commenced in State Courts.

The "saving to suitors" clause will in matters involving maritime torts amount to a promise to the ear only to be broken to the hope of suitors who wish to avail themselves of an appropriate state forum.

## POINT III

**There is no pendent jurisdiction of the second, third and fourth causes of action.**

As has been indicated heretofore if this Court finds jurisdiction to exist under the Jones Act so that the petitioner, as a foreign seaman suing a foreign shipowner for damages for personal injuries occurring on a foreign flagship in waters of the United States, with a Spanish contract of seamanship involved, had a right to invoke the benefits of said Act, then this point is academic.

Cases dealing with pendent jurisdiction seemingly stem from this Court's decision in *Hurn* v. *Oursler,* 289 U. S. 238. The difficulty that attends this question is seen from a reading of *Doucette* v. *Vincent,* 194 F. 2d 834; *Jordine* v. *Walling,* 185 F. 2d 662; *Mullen* v. *Fitz-Simons & Connell Dredge & Dock Co.,* 191 F. 2d 82; *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.,* 234 F. 2d 253; *McAfoos* v. *Canadian Pacific Steamships,* 243 F. 2d 250; *Jenkins* v. *Roderick,* unofficially reported in 1957 A. M. C. 2325.

In order for pendent jurisdiction to be applicable the District Court must have jurisdiction initially of a substantial claim within its jurisdiction. *Howard* v. *Furst,* 238 F. 2d 790, 794.

In the instant matter if the plaintiff had no right under the Jones Act to begin with then this Court never initially had jurisdiction to begin with. Therefore there would be no jurisdiction "pendent" upon an initially valid jurisdiction.

If the petitioner by any oblique reference to his wage claim, the second cause of action in his amended complaint (R. 201a), seeks to intimate that jurisdiction over all causes

of action are pendent upon his wage claim then it must be recognized that his wage claim (R. 200a-201a) seeks *wages to the end of the voyage.* He does not seek any proportion of wages which had been *earned.* Therefore, §597 of 46 U. S. C. is not at all involved since there is no allegation of withholding of earned wages which would bring the petitioner within the compass of §597 of 46 U. S. C.

The petitioner's dilemma in this case is dictated by his desire to have a trial by jury in the Federal Court in contrast to transferring this matter to the admiralty "side" of the District Court which had been offered to, and refused by, him (R. 189a, 252a).

He has availed himself of the "saving to suitors" provision of Section 1333 of 28 U. S. C. by his institution of an action against all of the defendants-respondents here involved in the Supreme Court of the State of New York, County of New York.

## CONCLUSION

**For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed in all respects to which end this brief is**

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